

15.3016

No. 15291

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
MERVIN L. GARDNER and MYRTLE G.
GARDNER, His Wife,
Appellees.

Transcript of Record

**Appeal from the United States District Court
for the District of Nevada**

FILED

JAN - 7 1957

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UNITED STATES OF AMERICA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,

Assistant U. S. Attorney General,
Tax Division, Department of Justice,
Washington 25, D. C.;

FRANKLIN RITTENHOUSE,

United States Attorney,
Post Office Building,
Reno, Nevada,

For the Appellant.

STEWART & HORTON,

Attorneys at Law,
131 West Second Street,
Reno, Nevada,

For the Appellees.

In the District Court of the United States
for the District of Nevada
No. 1210

MERVIN L. GARDNER and MYRTLE G. GARD-
NER, His Wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

STIPULATION

It Is Hereby Stipulated by and between counsel for the parties above named that plaintiffs may file herein a Second Amended and Supplemental Complaint, adding a Third Supplemental Complaint to the previous Amended and Supplemental Complaint filed herein.

It Is Further Stipulated that the defendant may have twenty days within which to answer the complaint as amended.

Dated: This 12th day of December, 1955.

/s/ ROYAL A. STEWART and

/s/ RICHARD W. HORTON,
Attorneys for Plaintiffs.

UNITED STATES OF
AMERICA,

By /s/ STANLEY H. BROWN,
Asst. U. S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed December 14, 1955. [17*]

[Title of District Court and Cause.]

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

Amended Complaint

Plaintiffs Complain of the United States of America and allege as follows:

I.

That jurisdiction of this action is conferred by Section 1346 (a) (1) of Title 28 of the United States Code.

II.

That plaintiffs are citizens of the United States and reside at the City of Reno and State of Nevada.

III.

That this action is one to recover an income tax erroneously and illegally assessed and collected without authority and wrongfully collected, and one to collect the sum hereinafter set forth, under the Internal Revenue Laws of the United States pursuant to authority conferred to sue by Section 1346 (a) (1) of Title 28 of The United States Code.

IV.

That for the calendar year ending December 31, 1952, plaintiffs' employer, Gardner Supply Co., a Corporation, withheld from plaintiffs' wages the sum of Two Thousand Three Hundred Two Dollars Twenty Cents (\$2,302.20) based upon an alleged

total wage of Fourteen Thousand Twenty-five Dollars (\$14,025.00); that said [18] income tax so withheld was erroneously and illegally assessed and collected without authority and wrongfully collected and paid to the extent of Two Thousand Two Hundred Forty-seven Dollars Forty-six Cents (\$2,247.46), arising from the fact that:

A. Plaintiffs' employer, Gardner Supply Co., credited upon the books of said corporation the sum of Seven Thousand Four Hundred and Twenty-five Dollars (\$7,425.00) never paid to or made available or available for the use of plaintiffs.

B. That by reason of the above reduction in income, plaintiffs' medical and dental expense deduction allowed and allowable is increased from Eight Hundred Seventy-nine Dollars Eighty-seven Cents (\$879.87) to the sum of One Thousand One Hundred Fifty-one Dollars Twelve Cents (\$1,151.12).

V.

That on or about the first day of January, 1954, plaintiffs filed with the Director of Internal Revenue at Reno, Nevada, an amended return requesting such refund in the sum of Two Thousand Two Hundred Forty-seven Dollars Forty-six Cents (\$2,247.46) plus interest on the tax wrongfully collected without authority for the calendar year ending December 31, 1952. A true copy of the said amended return is attached to the original complaint on file herein and marked Exhibit "A" and is made a part hereof by reference; a true copy of

the withholding statements for the calendar year ending December 31, 1952, is attached to the original complaint on file herein and marked Exhibit "B"; a true copy of the plaintiffs' original Income Tax Return for the calendar year 1952 is attached to the original complaint on file herein and marked Exhibit "C" and is made a part hereof by reference. That plaintiffs made an error in computing capital loss and that the adjusted gross income of plaintiffs for the calendar year 1952 was [19] Eight Thousand Seven Hundred Eighty-one Dollars Fifteen Cents (\$8,781.15) instead of Six Thousand Seven Hundred Eighty-one Dollars Fifteen Cents (\$6,781.15), and that plaintiffs' income tax for said year should be and is Four Hundred Twenty-one Dollars Eighty Cents (\$421.80).

VI.

That said demand for refund has been refused by defendant through its Director of Internal Revenue by reason of the fact that more than six months have elapsed since the filing of the claim for refund and said claim has not been allowed, and plaintiffs have been damaged thereby in the sum of One Thousand Eight Hundred Eighty-one Dollars Forty Cents (\$1,881.40) plus interest.

Supplemental Complaint

First Supplemental Count

As and for a first supplemental count plaintiffs complain of the United States of America and allege as follows:

I.

Reallege as if set forth here in haec verba Paragraphs I, II and III of plaintiffs' amended complaint.

II.

That for the calendar year 1953 plaintiffs overpaid their income taxes by the amount of Two Hundred Seventy-six Dollars Forty-six Cents (\$276.46).

III.

That Two Hundred Thirty Dollars Fifteen Cents (\$230.15) of said overpayment was assessed and applied to payment of alleged penalties on plaintiffs' income tax for the calendar year 1951, that said assessment, collection and application was erroneously and illegally made for the reason that plaintiffs fully and timely paid their income taxes for the calendar year 1951 and no penalties [20] were due or payable or properly assessable.

V.

That on February 23, 1955, plaintiffs filed with the Director of Internal Revenue at Reno, Nevada, a claim for refund of said \$230.15 plus interest, which claim was rejected and refused by said Director on March 21, 1955, all to the damage of plaintiffs in the sum of \$230.15 plus interest.

Second Supplemental Count

As and for a second supplemental count plaintiffs complain of the United States of America and allege as follows:

I.

Reallege as if set forth here in haec verba Paragraphs I, II and III of plaintiffs' amended complaint.

II.

That for the calendar year 1953 plaintiffs overpaid their income taxes by the amount of \$276.46.

III.

That \$46.31 of said overpayment was assessed and applied to payment of alleged penalties on plaintiffs' income tax for the calendar year 1951, that said assessment, collection and application was erroneously and illegally made for the reason that plaintiffs fully and timely paid their income taxes for the calendar year 1951 and no penalties were due or payable or properly assessable.

IV.

That on February 23, 1955, plaintiffs filed with the Director of Internal Revenue at Reno, Nevada, a claim for refund of said \$46.31 plus interest, which claim was rejected and refused by said Director on March 21, 1955, all to the damage of plaintiffs in the sum of \$46.31 plus interest. [21]

Third Supplemental Count

As and for a third supplemental count plaintiffs complain of the United States of America and allege as follows:

I.

That jurisdiction of this action and count is conferred by Section 1346 (a) (1) of Title 28 of the United States Code.

II.

That plaintiff Mervin L. Gardner is a citizen of the United States and resides at the City of Reno and State of Nevada.

III.

That this action and count is one to recover an Internal Revenue penalty collected without authority and wrongfully collected.

IV.

That on or about July 13, 1953, plaintiff Mervin L. Gardner was assessed Thirty-seven Thousand Three Hundred Ninety-two Dollars Seventy-seven Cents (\$37,392.77) by V. W. Evans, Director of Internal Revenue for the District of Reno, as a penalty under Section 2707 (a) of the Internal Revenue Code of 1939; said assessment being made against plaintiff Mervin L. Gardner as an officer of Gardner Supply Company, Inc., a corporation, for wilful failure to pay withholding taxes and F.I.C.A. taxes of said corporation.

V.

That plaintiff Mervin L. Gardner did not wilfully fail to pay, collect, or truthfully account for and pay over the said withholding taxes or F.I.C.A. taxes and did not wilfully attempt in any manner to evade or defeat any such taxes or the payment thereof.

VI.

That previous to the date hereof said plaintiff entered into a contract with the Sierra Ordnance

Depot, a facility of the United States Army; that said plaintiff performed said contract and was paid in part; that said plaintiff was not paid the final sum [22] of Seven Thousand Seven Hundred Ninety Dollars Seventy-eight Cents (\$7,790.78) due to said plaintiff, but instead said sum was paid by the United States Army to the United States Treasury Department and applied in part payment of the aforesaid penalty without said plaintiff's consent and against such plaintiff's wishes.

VII.

That on or about May 1, 1955, said plaintiff filed with said District Director a claim for refund of said \$7,790.78, a copy of which claim is attached hereto and made a part hereof as if set forth in haec verba, that said claim of refund has been refused by reason of the fact that more than six months have elapsed since the filing of said claim and said claim has not been allowed.

VIII.

That by reason of the foregoing, said plaintiff has been damaged in the sum of \$7,790.78 plus interest.

Wherefore, plaintiffs pray judgment may be entered herein in favor of plaintiffs and against defendant for:

1. \$1,881.40 plus interest on plaintiffs' amended complaint.

2. \$230.15 plus interest on plaintiffs' first supplemental count.

3. \$46.31 plus interest on plaintiffs' second supplemental count.

4. \$7,790.78 plus interest on plaintiffs' third supplemental count.

5. Costs of suit and such other and further relief as to the court may seem just.

Dated: This 30th day of November, 1955.

/s/ ROYAL A. STEWART,

/s/ RICHARD W. HORTON,

Attorneys for Plaintiffs. [23]

Demand for Jury

Plaintiffs hereby demand a trial by jury of all issues triable by jury upon the trial of the above-entitled action.

/s/ ROYAL A. STEWART,

/s/ RICHARD W. HORTON,

Attorneys for Plaintiffs. [24]

EXHIBIT "B"

Withholding Statement—1952

Wages Paid and Income and F.I.C.A.

Taxes Withheld

Employee's Copy (Duplicate)

Employee to Whom Paid—(Print name, full address, and Social Security account number):

Mervin L. Gardner,
2345 Arlington Ave.,
Reno, Nevada.
530-09-2427

Federal Insurance Contributions Act

Total F.I.C.A. wages (before payroll deductions)
paid in 1952.....\$12,750.00
F.I.C.A. employee tax withheld, if any.....\$54.00

Information for Income Tax Return

Total wages (before payroll deductions) paid in
1952\$12,750.00
Federal income tax withheld, if any.....\$2047.20

Employer by Whom Paid (Name, address, and identification number):

Gardner Supply Co.,
750 E. Fifth St.,
Reno, Nevada.
88-0056814

Withholding Statement—1952

Wages Paid and Income and F.I.C.A
Taxes Withheld

Employee's Copy (Duplicate)

Employee to Whom Paid—(Print name, full address, and Social Security account number):

Myrtle G. Gardner,
2345 Arlington Ave.,
Reno, Nevada.
530-20-0838

Federal Insurance Contributions Act

Total F.I.C.A. wages (before payroll deductions)
paid in 1952\$1275.00
F.I.C.A. employee tax withheld, if any.....\$19.13

Information for Income Tax Return

Total wages (before payroll deductions) paid in
1952\$1275.00
Federal income tax withheld, if any.....\$255.00

Employer by Whom Paid (Name, address, and identification number):

Gardner Supply Co.,
750 E. Fifth St.,
Reno, Nevada.
88-0056814

(Copy)

Form 843

U. S. Treasury Department

Internal Revenue Service

(Revised July 1953)

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

District Director's Stamp: [Blank]

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps:

Mervin L. Gardner.

Street address: 2345 Arlington Avenue.

City, postal zone number, and State: Reno, Nevada.

1. District in which return (if any), was filed:
Nevada.

* * *

3. Kind of tax: WT-FICA (6-53-540-0).

4. Amount of assessment: \$37,392.77.

* * *

6. Amount to be refunded: \$7,790.78.

* * *

The claimant believes that this claim should be allowed for the following reasons:

Taxpayer did not wilfully fail to pay, collect, or truthfully account for and pay over taxes withheld or F.I.C.A. taxes, and did not wilfully attempt in any manner to evade or defeat any such taxes or the payment thereof, and is not otherwise subject to the tax or penalty assessed and collected.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ MERVIN L. GARDNER.

Dated April 28, 1955.

[Endorsed]: Filed December 14, 1955. [25]

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED AND
SUPPLEMENTAL COMPLAINT

The defendant by its attorney, Franklin P. Rittenhouse, United States Attorney for the District of Nevada, answers the plaintiffs' complaint as follows:

Amended Complaint
First Defense

The defendant hereby moves the Court that the second amended complaint filed herein should be

dismissed on the ground that the Court has no jurisdiction over the subject matter of this cause, the grounds for this motion appearing more fully in the defendant's motion to dismiss filed with the Court on June 29, 1955, and the defendant hereby incorporates the grounds of the said motion to dismiss, the same as though set forth and restated in full herein.

Supplemental Complaint
First Supplemental Count and
Second Supplemental Count
Second Defense

The defendant hereby moves the Court that the First Supplemental Count and Second Supplemental Count of the Second Amended and Supplemental Complaint filed herein should be dismissed on the ground that the Court has no jurisdiction over the subject matter of this cause, the grounds for this motion appearing more [26] fully in the defendant's motion to dismiss filed with the Court on June 29, 1955, and the defendant hereby incorporates the grounds of the said motion to dismiss, the same as though set forth and restated in full herein.

Third Supplemental Count

1. The defendant admits the allegations contained in Paragraph I.
2. The defendant admits the allegations contained in Paragraph II.
3. The defendant denies the allegations contained in Paragraph III.

4. The defendant is without sufficient information at this time to form a belief as to the truth of the allegations of Paragraph IV, except to admit that the Commissioner of Internal Revenue assessed penalties under Section 2707 (a) of the Internal Revenue Code of 1939 against the plaintiff Mervin L. Gardner, 750 East 5th Street, Reno, Nevada.

5. The defendant denies the allegations contained in Paragraph V.

6. The defendant is without sufficient information at this time to form a belief as to the truth of the allegations of Paragraph VI.

7. The defendant is without sufficient information at this time to form a belief as to the truth of the allegations of Paragraph VII.

8. The defendant denies the allegations contained in Paragraph VIII.

Wherefore, the defendant having answered, prays that judgment be entered dismissing the plaintiff's complaint with prejudice, and that the defendant be awarded its costs and other relief which to the Court may seem just and proper.

FRANKLIN RITTENHOUSE,
United States Attorney:

By /s/ STANLEY H. BROWN,
Assistant U. S. Attorney,
District of Nevada.

[Endorsed]: Filed January 4, 1956. [27]

[Title of District Court and Cause.]

ORDER GRANTING MOTION OF
DISMISSAL, IN PART

The above-entitled matter came before the Court this 12th day of March, 1956, on the Government's motion for dismissal, Richard W. Horton appearing for the plaintiff, and Stanley H. Brown, Assistant United States Attorney, appearing for the Government, and the matter being argued in chambers on stipulation of counsel, and being fully considered by the Court; and it appearing that this Court lacks jurisdiction to hear and determine plaintiff's amended complaint, first supplemental count and second supplemental count; now, therefore, it is

Ordered, that said amended complaint, first supplemental count, and second supplemental count, be and the same are hereby dismissed.

Dated at Carson City, Nevada, this 12th day of March, 1956.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed March 12, 1956. [28]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Plaintiff Mervin L. Gardner moves the Court, pursuant to Rule 56 of the Federal Rules of Civil

Procedure, to enter judgment for said plaintiff for the relief demanded on the Third Supplemental Count of the Complaint on file herein, on the ground that there is no genuine issue as to any material fact in this action and that said plaintiff is entitled to judgment as a matter of law, as appears from the pleadings on file herein and the affidavits attached hereto and made a part hereof.

Dated: This 14th day of March, 1956.

/s/ ROYAL A. STEWART,

/s/ RICHARD W. HORTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed March 15, 1956. [29]

[Title of District Court and Cause.]

AFFIDAVIT

State of Nevada,
County of Washoe—ss.

Mervin L. Gardner, being first duly sworn, deposes and says:

1. That he is one of the plaintiffs in the above-entitled action.

2. That Plaintiffs' Third Supplemental Count in Plaintiffs' Complaint is one to recover an Internal Revenue penalty collected without authority and wrongfully collected.

3. That on or about July 13, 1953, affiant was assessed \$37,392.77 by V. W. Evans, Director of Internal Revenue for the District of Reno, as a penalty under Section 2707 (a) of the Internal Revenue Code of 1939; that said assessment was made against affiant as an officer of Gardner Supply Company, Inc., a corporation, for wilful failure to pay withholding taxes and F. I. C. A. taxes of said corporation; that said taxes were due as follows:

Fourth Quarter 1951—Wt. F. I. C. A. \$9,935.96

First Quarter 1952—Wt. F. I. C. A. 8,621.15

Second Quarter 1952—Wt. F. I. C. A. 6,715.74

Third Quarter 1952—Wt. F. I. C. A. 6,208.05

4. That previous to the commencement of the above-entitled action, defendant became indebted to affiant in the sum of \$7,790.78 for labor and materials supplied by affiant to defendant [30] at the Sierra Ordnance Depot; that defendant has wrongfully applied said \$7,790.78 to partial payment of said penalty without affiant's consent and against affiant's wishes.

5. That on or about May 1, 1955, affiant filed with said District Director a claim for refund of said \$7,790.78, a copy of which claim is attached to the original complaint on file herein; that more than six (6) months elapsed between the filing of said claim and the filing of plaintiffs' Third Supplemental Count herein.

6. That affiant did not wilfully fail to pay, collect, or truthfully account for and pay over the

said withholding taxes or F. I. C. A. taxes and did not wilfully attempt in any manner to evade or defeat any such taxes or the payment thereof.

a. That Walter Seegers was employed by said Gardner Supply Company, Inc. as auditor and that Ruth Walsh was employed by said corporation as bookkeeper.

b. That it was the business practice of said corporation to have the auditor make out the checks and the bookkeeper sign the checks for payment of corporate obligations.

c. That affiant instructed said auditor to make checks to pay the withholding and F. I. C. A. taxes for the fourth quarter of 1951 and the first and second quarters of 1952 and to make the proper reports.

d. That said auditor made the required reports for said quarters but, unknown to your affiant, did not make payment of taxes, as said corporation did not have sufficient funds to pay said taxes.

e. That your affiant knew said corporation was short of funds, but did not realize that said taxes had not been paid.

f. That on August 3, 1951, affiant borrowed \$10,295.00 upon his personal life insurance with Penn Life Insurance Co., which sum was loaned to said corporation and used to pay \$6,525.80 [31] due on corporate withholding taxes and \$1,794.30 on corporate social security taxes, said payments being

made to the Collector of Internal Revenue on August 18, 1951.

g. That on February 20, 1952, affiant secured a loan from his brother, P. K. Gardner, to the corporation, of \$3,255.82, personally guaranteed by affiant to pay the current payroll of said corporation.

h. That on February 21, 1952, affiant loaned \$100.00 to said corporation and on February 23, 1952, affiant loaned \$4,000.00 to said corporation to pay the current payroll of said corporation; that said loans practically exhausted affiant's personal resources.

i. That during the latter part of 1951 and up to September 16, 1952, said corporation was operating on borrowed capital, had assigned the proceeds of its jobs to its lenders as security for said loans, and all through said period of time was on the narrow edge of bankruptcy.

j. That the fourth quarter of 1951 taxes were payable in January, 1952, at the end of which month said corporation had written checks for \$7,673.27 more than was in the bank.

k. That the first quarter of 1952 taxes were payable in April, 1952, at the end of which month said corporation had written checks for \$2,382.34 more than was in the bank.

l. That the second quarter of 1952 taxes were payable in July, 1952, at the end of which month

said corporation had written checks for \$3,045.46 more than was in the bank.

m. That the third quarter of 1952 taxes were payable in October, 1952; that on September 16, 1952, before the last month of the third quarter of 1952 expired, said corporation went into receivership and your affiant no longer had any control over the affairs of said corporation; that it was legally and factually impossible for affiant to pay the withholding and F.I.C.A. taxes [32] for the third quarter of 1952, even had said corporation had the ability to pay.

n. That from the first of 1952 to August 31, 1952, said corporation had an operating loss of \$217,458.20.

o. That on December 31, 1950, said corporation had demand notes outstanding in the amount of \$209,000.00; on December 31, 1951, \$296,192.50 outstanding, and on September 16, 1952, the day said corporation went into receivership, \$234,441.64 was outstanding; that the reduction in notes receivable between December 31, 1951, and September 16, 1952, was occasioned by the receipt by the corporate creditors of amounts assigned to said creditors prior to the fourth quarter of 1951; that said demand notes were payable out of the earnings of said corporation as soon as said earnings were realized.

7. That the withholding and F.I.C.A. taxes here involved could have been paid only if said corpora-

tion had borrowed additional funds, and the assets of said corporation and of your affiant were completely pledged on previous loans; that your affiant guaranteed the loans to said corporation in an effort to keep said corporation solvent, and is still paying off said corporate obligations to the best of his ability.

8. That as a result of the loans made by Affiant to said corporation and of affiant drawing less than his agreed wage from said corporation, said corporation was indebted to affiant in the amount of \$6,814.30 on September 16, 1952, the date said corporation went into receivership, as reflected by the drawing account of affiant on the books of said corporation; that the books of said corporation were audited in said receivership and said drawing account found to be proper; that said receivership was administered by the above-entitled Court.

/s/ MERVIN L. GARDNER,
Affiant.

Subscribed and Sworn to before me this 14th day of March, 1956.

[Seal] /s/ RICHARD W. HORTON,
Notary Public in and for said
County and State.

My Commission Expires 12-18-57.

[Endorsed]: Filed March 15, 1956. [33]

[Title of District Court and Cause.]

CROSS MOTION FOR SUMMARY
JUDGMENT

To Stuart and Horton, Attorneys at Law, 131 West
2nd Street Reno, Nevada, Attorneys for Plain-
tiffs.

Please Take Notice that upon the hearing of the
plaintiffs' Motion for Summary Judgment herein,
defendant will move this court for Summary Judg-
ment in its favor on the ground that the admissions
contained in the plaintiffs' Affidavit in support of
their Motion for Summary Judgment entitled de-
fendant to judgment in its favor as a matter of
law.

As indicated in the Affidavit submitted in opposi-
tion to the plaintiffs' Motion, by this Cross Motion
defendant does not concede that there are no dis-
puted issues of material fact in this action to sup-
port any judgment for the plaintiffs.

FRANKLIN RITTENHOUSE,
United States Attorney;

By /s/ STANLEY H. BROWN,
Assistant United States At-
torney. [34]

[Title of District Court and Cause.]

AFFIDAVIT

State of Nevada,
County of Washoe—ss.

Homer H. Forrester, being first duly sworn, deposes and says:

1. That he is the Chief of the Delinquent Accounts and Returns Branch, and as such has custody of the pertinent files and records in the office of the District Director of Internal Revenue, Reno, Nevada.

2. That he had personally examined and is familiar with these records and has supervised the investigation into the affairs of the Gardner Supply Company, Inc. and Mervin L. Gardner, their records and the records of third parties having business transactions with them.

3. That on the basis of his personal knowledge and on the records of the office of the District Director made in the regular course of its investigations into the liabilities herein, affiant states that:

(a) Mervin L. Gardner was in complete control of all phases of the operations of the Gardner Supply Company, Inc. during the times covered by the assessments herein and had full knowledge of the financial and tax affairs of the Gardner Supply Company, Inc.

(b) That Mervin L. Gardner was personally contacted by the office of the District Director on

numerous occasions during the period the liability herein arose with repeated demands for payment by the Gardner Supply Company, Inc. of its taxes and he admitted knowledge of the corporation's liabilities.

(c) That although he had knowledge that the corporation was not paying or making provision for the paying over to the District Director of the Withholding and employment taxes, Mr. Gardner, in control of the affairs of the Gardner Supply Company, Inc., continued to employ labor on behalf of the corporation during the fourth quarter of 1951 and during the first, second, and third quarters of 1952 and to pay such labor, and he knowingly and wilfully failed to pay, collect, or truthfully account for and pay over the withholding and employment taxes that had been or should have been withheld from such labor payments and which should have been paid over to the defendant.

(d) Mervin L. Gardner was at all times aware of the financial condition of the Gardner Supply Company, Inc. and the availability and disposition of its funds.

(e) The money withheld was used and diverted to pay other expenses of the Gardner Supply Company, Inc. and Mervin L. Gardner individually.

(f) The assessments herein were properly made and any monies collected thereon properly collected. These assessments were made on or about July 1.

1953, and the total amount of the assessments was \$38,781.63 plus statutory additions.

(g) Without admitting any of the other allegations in the affidavit, he denies knowledge of the self-serving allegations in paragraph 6 of the plaintiffs' Affidavit, and denies particularly the allegations in paragraph 6c, d and e, and paragraphs 7 and 8 thereof.

/s/ HOMER H. FORRESTER.

Subscribed and sworn to before me this 27 day of April, 1956.

[Seal] /s/ D. B. STEWART.

My Commission Expires May 26, 1959.

[Endorsed]: Filed April 28, 1956.

In the District Court of the United States
for the District of Nevada

No. 1210

MERVIN L. GARDNER and MYRTLE G
GARDNER, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER FOR SUMMARY JUDGMENT

This cause came on to be heard on the motion of plaintiff Mervin L. Gardner for a summary judg-

ment as authorized by Rule 56 of the Federal Rules of Civil Procedure, and it appearing to the Court from the affidavits of Mervin L. Gardner and Homer H. Forrester, from the stipulations of the parties, and from the pleadings that there is no genuine issue as to any material fact and that plaintiff Mervin L. Gardner is entitled to a judgment as a matter of law:

It Is Therefore Ordered, Adjudged and decreed that summary judgment be entered in favor of plaintiff Mervin L. Gardner and against defendant for the sum of \$7,790.78 together with interest thereon at the rate of six per cent (6%) per annum from the date of collection to a date preceding the date of the [35] refund check by not more than thirty days as provided by Title 28, Sec. 2411 U. S. Code Annotated.

Dated: This 2nd day of May, 1956.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed May 2, 1956. [36]

[Title of District Court and Cause.]

DOCKET ENTRIES

Docket Entry of May 1, 1956

Entg. judgment. Judgment: Ordered that plaintiff's motion for summary judgment be, and the same hereby is, granted.

Counsel notified of above entry.

Docket Entry of May 28, 1956

Entg. Judgment in accordance with above order. Judgment: It Is Therefore Ordered, Adjudged and Decreed that summary judgment be entered in favor of plaintiff Mervin L. Gardner and against defendant for the sum of \$7,790.78 together with interest thereon at the rate of six per cent (6%) per annum from the date of collection to a date preceding the date of the refund check by not more than thirty days as provided by Title 28, Sec. 2411, U. S. Code Annotated.

Counsel notified of above entry.

(A true copy.) [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is herby given that United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the

Ninth Circuit from the Summary Judgment entered in the above-entitled action in favor of plaintiffs and against defendant on the 1st day of May, 1956.

Dated: This 26th day of June, 1956.

FRANKLIN RITTENHOUSE,
United States Attorney;

By /s/ STANLEY H. BROWN,
Assistant U. S. Attorney.

[Endorsed]: Filed June 27, 1956. [38]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Upon motion of defendant, and good cause appearing:

It Is Hereby Ordered, pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure, that the time for filing and docketing the record on appeal in the above-entitled matter be, and it hereby is, extended to and including the 25th day of September, 1956.

Dated this 1st day of August, 1956.

/s/ JAMES R. ROSS,
United States District Judge.

[Endorsed]: Filed August 1, 1956. [39]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now the defendant-appellant, United States of America, and designates the portions of the record and proceedings to be contained in the record on appeal herein:

The defendant-appellant hereby designates the entire record herein, including the docket entries and all pleadings, stipulations, motions, orders and the judgment as entered.

Dated this 10th day of September, 1956.

FRANKLIN RITTENHOUSE,
United States Attorney;

By /s/ STANLEY H. BROWN,
Assistant U. S. Attorney.

Service of the foregoing Designation is hereby admitted this 10th day of September, 1956.

/s/ RICHARD W. HORTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed September 11, 1956. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

1. Oliver F. Pratt, Clerk of the United States

District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of orders or judgments entered on the docket of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of District Court this 18th day of September, A. D. 1956.

[Seal] /s/ OLIVER F. PRATT,
Clerk. [41]

[Endorsed]: No. 15291. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Mervin L. Gardner and Myrtle G. Gardner, His Wife, Appellees, Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed September 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15291

UNITED STATES OF AMERICA,

Defendant-Appellant,

vs.

MERVIN L. GARDNER and MYRTLE G.
GARDNER, His Wife,

Plaintiffs-Appellees.

STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

Comes now the United States of America, Appellant in the above-mentioned proceeding by and through its attorney of record, Franklin P. R. Rittenhouse, United States Attorney in and for the District of Nevada, and hereby states that it extends to rely upon the following points in this appeal:

The District Court erred:

1. In deciding the issue in this proceeding in favor of the plaintiffs.
2. In granting the motion of plaintiff Mervin L. Gardner for summary judgment.
3. In failing and refusing to grant defendant's motion for summary judgment.

4. In entering summary judgment in favor of plaintiff Mervin L. Gardner.

5. In failing and refusing to enter judgment for the defendant dismissing the complaint.

6. In holding and deciding that the plaintiff, Mervin L. Gardner is not liable for the penalty imposed by Section 2707 (a) of the Internal Revenue Code of 1939 for wilful failure to pay, collect, or truthfully account for and pay over withholding and unemployment taxes assessed against the Gardner Supply Company, Inc. for the fourth quarter of 1951 and the first three quarters of 1952.

7. In failing and refusing to hold and decide that there are material issues of fact which can be resolved only by trial of this cause on its merits.

8. In that its holding and decision are not supported by, but are contrary to the facts revealed by the pleadings and affidavits on file, and

9. That its holding and decision are contrary to law.

/s/ FRANKLIN RITTENHOUSE,
United States Attorney.

Service of copy admitted.

[Endorsed]: Filed September 20, 1956.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF
RECORD TO BE PRINTED

Pursuant to Rule 75 of the Federal Rules of Civil Procedure and Rule 17 of the Rules of this Court, appellant hereby designates the following parts of the record on appeal to be printed:

1. All docket entries.
2. Stipulation filed December 14, 1955, that plaintiff may file a second amended and supplemental complaint and that defendant may have twenty days to answer.
3. Second amended and supplemental complaint filed December 14, 1955.
4. Answer to second amended and supplemental complaint filed January 4, 1956.
5. Order granting defendant's motion of dismissal, in part, filed and entered March 12, 1956.
6. Motion of the plaintiff, Mervin L. Gardner, for summary judgment filed March 15, 1956.
7. Affidavit of Mervin L. Gardner filed March 15, 1956, in support of the motion for summary judgment.
8. Cross motion for summary judgment by the defendant and attached affidavit of H. H. Forrester filed April 28, 1956.

9. Order granting the motion for summary judgment of plaintiff Mervin L. Gardner entered May 1, 1956.

10. Judgment for plaintiff Mervin L. Gardner entered May 28, 1956.

11. Defendants' notice of appeal filed June 27, 1956.

12. Order extending time to transmit record filed August 1, 1956.

13. Defendant's designation of entire record for transmittal to the Court of Appeals for the Ninth Circuit filed September 19, 1956.

14. Statement of points to be relied upon by appellant.

15. This designation.

/s/ FRANKLIN RITTENHOUSE,
United States Attorney.

Service of copy admitted.

[Endorsed]: Filed September 20, 1956.

